

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH DANIEL ANDRUS,

Defendant-Appellant.

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UNPUBLISHED  
February 14, 2003

No. 236095  
Shiawassee Circuit Court  
LC No. 00-005820-FH

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a) (under thirteen years of age). Defendant was sentenced to forty-eight months' probation, with the first and last six months of probation to be served in the county jail. On appeal, defendant claims that he received ineffective assistance of counsel based on trial counsel's failure to call two witnesses to testify to a statement they heard, and to testify to the victim's reputation for untruthfulness in the community. Defendant also argues that trial counsel failed to investigate other potential witnesses to present the victim's reputation for untruthfulness in the community. We affirm.

I. Facts

This criminal sexual conduct case presented a credibility contest between defendant and the eleven-year-old victim. Defendant is the victim's uncle by marriage. Defendant's wife, Kris Andrus (hereinafter "Kris"), and the victim's mother are sisters. At trial, the victim's version of the underlying events was that she and her family were spending the night at defendant's house. The two families were in the living room, watching a movie. Because the victim had already seen the movie, she went upstairs to defendant's bedroom to watch a different movie. There was no door either at the bottom or the top of the stairs to separate defendant's bedroom from the rest of house. She had been upstairs for about an hour when defendant came into the bedroom and told her to turn off the movie. Defendant turned off the light and got into the bed next to the victim. The victim did not fall asleep. About an hour later, defendant got up, turned on the light, and returned to bed. Defendant then reached under the victim's shorts and underwear, and rubbed the victim's vagina for about two minutes. While defendant was touching her, the victim kept her eyes closed. The victim testified that this was the first time that defendant had ever touched her like that, and that she was surprised and scared. The victim sat up and said, "I have

to go to the bathroom.” The victim went down stairs and slept with her family in the living room.

The next morning, the victim did not speak of the incident because she was afraid that her mother and Kris would fight and the families would be estranged. However, two months later, she told her twelve year old cousin, the daughter of Francis Fink (hereinafter “Fink”), another sister of the victim’s mother. Shortly afterward, defendant and his wife heard about the accusation. The victim testified that, when Kris confronted her about the accusation, she lied to Kris and told her that it might have been a dream.

At the time when defendant and his wife learned of what the victim had said, the victim and her siblings were staying at defendant’s house because the victim’s mother was staying in the stress unit of a hospital. Kris and Fink took the victim to the hospital to inform the victim’s mother of the accusation. On cross-examination, the victim’s mother denied that she accused the victim of lying. The victim’s mother notified a nurse at the hospital and an investigation into the matter began.

Defendant testified that, on the night in question, there was no room to sit on the living room couch, so he went up to the bedroom to lay down and watch television. The victim came up to watch a movie. Defendant fell asleep watching the movie, and recalled nothing other than waking up the next day. Defendant maintained that he did not touch the victim in an inappropriate way, and that he has no idea why the victim would make up this story.

The prosecution’s theory of the case was that defendant, believing that the victim was asleep, decided to touch her vagina without anyone knowing. Defendant’s trial counsel gave two theories for the case. First, defendant was sleepwalking when he turned on the lights and he may have reached over and touched the victim, thinking that she was his wife. Second, that the victim made up the story to force her mother out of the hospital.

## II. Analysis

Defendant first argues that he was denied the effective assistance of counsel because trial counsel failed to call as witnesses Kris and Fink, the victim’s aunts, who would have testified to the victim’s reputation for untruthfulness in the community.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To prove a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny the defendant a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court presumes that counsel’s conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *People v*

*Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The decision to present evidence, to call a witness, and in what manner to impeach a witness, is a matter of trial strategy. *Id.* at 77. It is improper to use the benefit of hindsight to second-guess counsel's trial tactics. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). The fact that the trial strategy chosen did not work does not constitute ineffective assistance of counsel. *Id.*

At the *Ginther*<sup>1</sup> hearing, defendant's trial counsel, Robert Hoschner, testified that his strategy at the trial was to point out to the jury that the victim was not truthful. Immediately following defendant's testimony, he informed Kris and Fink that both defendant and the victim had presented excellent testimony. He informed them that he believed that any attempt to damage the victim's reputation would work against defendant's case. He told the women that he was uncomfortable in calling Kris to the stand because, when she testified at the preliminary examination, "it appeared that she would say things to try and boost [defendant] up, and it would look to a jury like she would be willing to lie for him." Further, at the preliminary examination, Kris got angry with the prosecutor, and Hoschner had noticed her demeanor. He believed that her trial testimony would be risky. He also did not believe that presenting testimony on the victim's reputation for untruthfulness in the community would be helpful, particularly when defendant had presented excellent testimony. Hoschner also testified that the decision not to call Kris and Fink was not his. After presenting his beliefs to defendant and the two women, it was their collective decision not to call the two women to the stand.

Fink also testified at the *Ginther* hearing. In his brief on appeal, defendant failed to note that Fink admitted that she did not live in the victim's community and could not testify to the victim's reputation for truthfulness in the community. Kris did not testify at the *Ginther* hearing.

From our review of the record, we conclude that the trial court properly found the decision by defendant's counsel not to call the two witnesses was trial strategy that will not be second-guessed on appeal.

Defendant next argues that he was deprived of effective assistance of counsel because trial counsel failed to call Kris and Fink to testify to the statement the victim's mother allegedly made when she learned of her daughter's accusation against defendant. According to affidavits signed by these two potential witnesses, the victim's mother accused her daughter of not telling the truth. According to Fink's testimony at the *Ginther* hearing, the victim's mother did not believe the victim's story and accused the victim of telling tall tales.

A hearsay statement is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c); *People v Poole*, 444 Mich 151, 158-159; 506 NW2d 505 (1993). Hearsay is inadmissible as substantive evidence except as the rules of evidence otherwise provide. *Id.*, 159.

The record shows that the proffered testimony was offered to establish the truth of the matter asserted. Kris' and Fink's allegations that the victim's mother told the victim that she was lying, would clearly be offered to prove that the victim was, in fact, lying. This is hearsay, and

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

unless some exception applies, it is inadmissible. Although the *Ginther* hearing transcript shows that the hearsay question was raised,<sup>2</sup> defendant's brief on appeal does not even recognize that the testimony constituted inadmissible hearsay. Defendant, therefore, makes no showing that it would fall under any of the exceptions to the hearsay rule. Counsel may not leave it to this Court to rationalize a basis for his claim. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Our review of the record shows that defendant's counsel properly brought the issue to the jury's attention by questioning the victim's mother about the alleged statement. Further, we note that trial counsel was alert and active during trial, objecting to hearsay statements and leading questions. Trial counsel used the testimony from the preliminary examination to challenge the victim's credibility. In spite of this, the jury found the victim credible. The credibility of a witness is a matter for the jury to ascertain and should not be reviewed anew on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). In light of the above, defendant has not overcome the presumption that the decision not to call the two witnesses was sound trial strategy.

Finally, defendant argues that trial counsel had an improper motive for not calling the witnesses. Defendant asserts that trial counsel decided not call other witnesses so as not to "upset the judge" because further testimony would extend the trial beyond the stay of the judge, and the judge would have to dismiss the case. On appeal, defendant provides no argument or support for the claim. Instead, our review of the record shows that there was ample time for the defense to call additional witnesses, and defendant's counsel testified that he had one half of an hour following defendant's trial testimony to decide whether to call further witnesses. He conferred with the two women and with defendant, and informed them of his belief that to call further witnesses would damage defendant's case. Defendant and the two women decided not to present the witnesses' testimony. Therefore, defendant's claim is without merit.

Affirmed.

/s/ David H. Sawyer  
/s/ Kathleen Jansen  
/s/ Pat M. Donofrio

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<sup>2</sup> On cross-examination, Hoschner testified that he did not call the two women as witnesses because he believed that their testimony was inadmissible hearsay.